

FCC MAIL SECTION

Federal Communications Commission

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Amendment of Section 73.606(b),	)	MM Docket No. 98-175
Table of Allotments, Television	)	RM-9364
Broadcast Stations and	)	
Section 73.622(b), Table of Allotments,	)	
Digital Television Broadcast Stations	)	
(Buffalo, New York).	)	

**Memorandum Opinion and Order**

Adopted: April 6, 2000

Released: April 19, 2000

By the Commission:

1. Before us is an Application for Review of the *Report and Order*<sup>1</sup> which amended the Television Table of Allotments for Buffalo, New York at the request of Western New York Public Broadcasting Association ("WNYPBA"), licensee of Stations WNED-TV, Channel 17, and WNEQ-TV, Channel \*23, Buffalo, New York, to reflect Channel 17 as reserved for noncommercial educational use, and Channel 23 as nonreserved, and related changes to the DTV Table of Allotments. Coalition for Noncommercial Media ("CNM"), a group of Buffalo-Area citizens and WNED/WNEQ-TV viewers filed this Application for Review, alleging that the Mass Media Bureau erred in making these amendments. WNYPBA opposes the Application for Review. CNM also filed a Petition for Emergency Relief, supported by Citizens for Independent Public Broadcasting in an *amicus curiae* filing. WNYPBA also opposes this pleading.

2. **Background.** The *Report and Order* granting the change of reservation, considered and rejected arguments opposing WNYPBA's request by Grant Television, Inc. ("Grant") licensee of WNYO-TV, Buffalo, New York, WKBW-TV Licensee, Inc. ("WKBW"), licensee of Station WKBW-TV, Buffalo, New York, Kevin Smardz, President of Southtowns Christian Center, Lakeview, New York, and CNM. The *Report and Order* also denied CNM's counterproposal requesting that the Commission amend the TV Table of Allotments to reserve all unreserved channels being used for noncommercial operation on the grounds that it was not mutually exclusive with the WNYPBA proposal.

3. The *Report and Order* made a two-fold holding in favor of WNYPBA's proposal to exchange the channel reservation between its two stations. First, it held that the exchange of reservation would serve the public interest, and second, that it could be effectuated under the Commission's existing rules and policies. With respect to the first issue, the Bureau noted that there would be no diminution in noncommercial educational service in Buffalo. Indeed, such service would expand because Station WNED-TV is clearly the more powerful and broad reaching of the two stations. It also noted that WNYPBA could sell Station WNED-TV, arguably the more valuable and marketable station, on

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<sup>1</sup> See 14 FCC Rcd 11856 (1999).

unreserved Channel 17 as a commercial entity at any time,<sup>2</sup> but that it had foregone this opportunity in order to retain noncommercial educational service on Station WNED-TV on Channel \*17. The Bureau also pointed out that under the Commission's rules allowing intraband channel swaps between commercial and noncommercial stations, WNYPBA, after selling Station WNED-TV, could have then swapped channels with WNED-TV's new licensee and reached the same result as its proposed reservation exchange.<sup>3</sup> The Bureau also stated that retaining Station WNED-TV as a public station on a reserved channel would serve the public interest because it would preserve Station WNED-TV's service to Buffalo as a noncommercial educational station without requiring the administrative and financial expense of a two-stage filing.

4. The Bureau also found that the public interest would be served by granting WNYPBA's proposal because the proceeds of the sale of Station WNEQ-TV were pledged to fund a trust that would be used to upgrade Station WNED-TV to digital service and thus provide expanded service to the community. Therefore, just as noted in the *Report and Order* in MM Docket No. 85-41 as justification for granting intraband channel exchanges, this exchange would allow noncommercial stations to improve their broadcast services.<sup>4</sup> In addition, just as noted in the *Report and Order* in MM Docket No. 85-41, the Bureau found additional justification provided by the fact that this exchange would not result in the elimination of any noncommercial channel reservations.

5. Second, the Bureau held that this proposal could be effectuated in accordance with Section 309 of the Act and our rules without soliciting competing expressions of interest for dereserved Channel 23 for the same reasons as those given when the Commission adopted the intraband channel swap provision of Section 1.420(h).<sup>5</sup> As stated above, petitioner could have filed this proposal in two stages, the first being a sale of its commercial station, and the second a channel exchange pursuant to Section 1.420(h) of the rules to regain the channel it desires. At the time Section 1.420(h) was adopted, the Commission recognized that it needed to create a process whereby commercial and noncommercial educational television stations could voluntarily exchange channels within the same band without being subjected to competition for their channels. It noted that proceedings initiated by parties proposing channel exchanges would be withdrawn whenever competing expressions of interest were filed against their stations, and thus result in a waste of Commission, public and licensee resources.<sup>6</sup>

6. The Bureau also addressed the issue of "second service" noncommercial educational television stations in reference to the parties' concerns with respect to the ultimate loss of Station

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<sup>2</sup> As noted by the Bureau, the defining factor in a station's mode of operation is not its classification as commercial or noncommercial, but rather the designation of its channel as reserved or unreserved. *Memorandum Opinion and Order* in Docket Nos. 8736 et al., 8 RR 469-70 (1952). The unreserved channels can be used commercially or noncommercially, as the licensee sees fit. *Id.*

<sup>3</sup> See 47 CFR §1.420(h); see also, *Report and Order* in MM Docket 85-41, 59 RR 2d 1455 (1986) *aff'd*, *Rainbow Broadcasting Co. v. F.C.C.*, 949 F.2d 405 (1991).

<sup>4</sup> *Report and Order* in MM Docket 85-41, 59 RR 2d at 1464.

<sup>5</sup> *Id.* at 1463.

<sup>6</sup> *Id.*

WNEQ-TV. It noted that parties had argued that the community of Buffalo continues to need a second non-commercial educational ("NCE") television station, and that Station WNEQ-TV served an important function in the community by providing 56 hours of unique noncommercial programming every week. CNM stated that the Commission should absolutely decline to dereserve any public television channel if the dereservation would result in the loss of a public television station. The Bureau also noted that WNYPBA responded to these arguments by stating that a blind adherence to preservation of the *status quo* is counterproductive and would discourage innovation and creativity in the public broadcast field at a time when new and imaginative solutions to the problems facing the industry are needed most. WNYPBA noted that requiring all second channel stations to remain as public television stations by rulemaking is contrary to the current state of the public broadcasting industry which is trying to discourage unnecessary overlap of duplicating stations, to foster increased efficiencies of production and operation and to encourage mergers, consolidations and other arrangements designed to halt the number of stations offering duplicative programming and to assure the long-term viability of the service.

7. Finally, the Bureau addressed CNM's argument that the petitioner's proposal could spark a "flood" of requests by other public broadcasters seeking to sell their second channel public television stations, citing to the *Pittsburgh* situation.<sup>7</sup> CNM expressed concern that so-called "second service" stations, which typically cater to smaller audiences, will be lost forever. The Bureau noted that CNM's concerns were not well founded. First, it stated that there would be little likelihood that a flood of requests such as this would be successfully filed, since there are only a handful of other pairs of noncommercial educational television stations that are co-owned in communities *and* one station is operating on an unreserved channel, as in the instant case. It pointed out that there is a difference between these situations and those in which there are two public stations in a market operating on *reserved* channels, as in *Pittsburgh*. Those would differ from the instant case, as they would require loss of a reserved channel in the community, and thus require a different standard of review.<sup>8</sup>

8. The Bureau also addressed CNM's "counterproposal," which had two aspects: one requesting that we reserve Channel 17 at Buffalo, and one requesting that we reserve all unreserved channels of stations which were being operated noncommercially. The Bureau considered CNM's counterproposal as not appropriately filed in this proceeding because CNM's request to reserve all unreserved channels of stations being operated as noncommercial stations was not mutually exclusive with WNYPBA's proposal at Buffalo.

9. **Application for Review.** CNM argues again that the Bureau should have denied WNYPBA's request for the channel reservation swap. CNM goes on to argue that the Bureau failed to consider its "counterproposal." As stated above, CNM proposed first, that the Commission reserve Channel 17 at Buffalo, and retain the reservation on Channel 23, thus increasing from one to two the number of noncommercial educational stations on reserved channels in the community of Buffalo. Second, it proposed that the Commission reserve nationwide all commercial channels in the TV Table of Allotments on which stations are operated on a noncommercial basis. CNM argues that the Commission

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<sup>7</sup> See *In the Matter of Deletion of Noncommercial Reservation of Channel \*16, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700 (1996) ("*Pittsburgh*") (Commission denied a request that a noncommercial allotment be dereserved to permit commercial broadcasting by assignee).

<sup>8</sup> *Id.* at 11708.

erred when it stated that this pleading was not mutually exclusive with the WNYPBA proposal because its proposal to reserve Channel 17 at Buffalo was in direct conflict with the channel exchange. CNM goes on to argue that its "counterproposal" to reserve Channel 17 at Buffalo should have been considered with WNYPBA's on a comparative basis and that its proposal to reserve Channel 17 should have been granted. It then repeats all of the arguments it made in its comments before the Bureau. CNM's Petition for Emergency Relief, supported by Citizens for Independent Public Broadcasting, requests that the Commission stay the effect of the *Report and Order*, and prevent WNYPBA from converting Station WNEQ-TV (or WNED-TV) to commercial operation until the resolution of its proposal to reserve Channel 17 in this matter. CIPB's pleading, although titled a support of the petition for emergency relief, argues against the merits of the channel swap itself.

10. **Discussion.** As a preliminary matter, we will note that CNM's Petition for Emergency Relief is moot and will be dismissed. Furthermore, we will not address CNM's repeated arguments against the reservation swap. The Bureau properly addressed CNM's arguments in the *Report and Order* and we will not disturb its decision. However, we will address CNM's argument that the Bureau overlooked the first aspect of CNM's "counterproposal," to reserve Channel 17 at Buffalo. CNM argues that pursuant to the holding of *Ashbacker v F.C.C.* ("*Ashbacker*"),<sup>9</sup> the Bureau erred when it failed specifically to address its disposal of CNM's "counterproposal" requesting the reservation of Channel 17 at Buffalo. CNM argues that the Bureau's reasoning that CNM's "counterproposal" for Channel 17 at Buffalo was not mutually exclusive with the petition filed by WYNPBA was in error and under *Ashbacker* the Bureau was required to consider it.

11. While the Bureau may have omitted mention of its specific disposal of CNM's "counterproposal" to reserve Channel 17 at Buffalo, any error this involved was harmless. First, a third party may not petition for a change in another station's authorization, particularly if the licensee has disavowed an interest in the particular proposed change.<sup>10</sup> In addition, contrary to CNM's argument, the Bureau correctly held that the rule of *Ashbacker* does not apply to channel exchanges because the channels are occupied.<sup>11</sup> Finally, although the two proposals may have been mutually exclusive as a matter of common usage because they could not co-exist, they were not mutually exclusive within the strict interpretation of that phrase as a term of art applied to broadcast channel allotments, which presumes a short-spacing between two channels.

12. We also note that the Bureau correctly held that the second aspect of CNM's "counterproposal," to reserve all unreserved channels of stations operating as noncommercial educational stations was not appropriately filed in this matter. The Bureau was constrained to limit its decision to the merits of the issues as they applied to the instant parties. The issue of reserving all unreserved channels on which licensees operate noncommercially is a matter appropriately raised as a general rulemaking, not as an issue to be resolved in an adjudicatory proceeding such as this.

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<sup>9</sup> 326 U.S. 327 (1945) (holding that the Commission could not grant one of two mutually exclusive applications for a broadcast license without affording the other a comparative hearing).

<sup>10</sup> See *Report and Order* in MM Docket No. 92-195, 8 FCC Rcd 2197 (1993); *aff'd*, 8 FCC Rcd 8515 (1993); *Application for Review dismissed*, 11 FCC Rcd 4641 (1996).

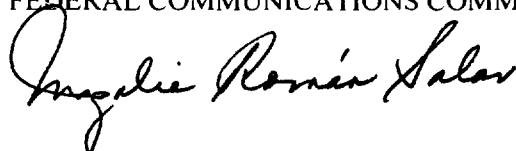
<sup>11</sup> See *Report and Order* in MM Docket 98-175, 14 FCC Rcd at 11860.

13. Finally, CNM repeats an argument made to the Bureau that allowing this transaction could spark a "flood" of requests by other public broadcasters seeking to sell their "second channel" public television stations.<sup>12</sup> CNM claims that the Bureau's answer to this argument mischaracterized the number of noncommercial stations operating on unreserved frequencies. CNM is incorrect. First, the Bureau accurately noted that there are only a handful of communities in which a pair of *co-owned* noncommercial educational television stations are operating with one station on an unreserved channel, just as in the instant case. These cases differ from situations in which there are two independently owned public stations in a market in which one is operating on an unreserved channel. They also differ from situations in which there are two commonly owned public stations in a market operating on *reserved* channels, such as the case involving two Pittsburgh noncommercial stations cited by CNM.<sup>13</sup> As the Bureau correctly held, the situations cited by CNM differ from the instant case principally because this case involves no loss of a reserved channel, whereas the cases cited by CNM would result in the loss of a reserved channel in the community, a result heavily disfavored by our policies.<sup>14</sup> Where, as here, no diminution in the number or quality of reserved channels is involved, we defer to the clear prerogative of a licensee on a commercial channel to sell its station to a commercial entity.<sup>15</sup>

14. IT IS ORDERED, That CNM's Petition for Emergency Relief IS DISMISSED as moot.

15. IT IS ORDERED, That the Application for Review filed by Coalition for Noncommercial Media IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

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<sup>12</sup> CNM reargues that the Commission should preserve this "second channel" station and claims that the Commission has a policy of establishing two public TV stations in a community where ever possible. While that is a sentiment with which we hesitate to disagree, it has no actual legal basis. CNM seems to base this claim on the belief that the rationale applied in the *Pittsburgh* case cited above would apply here. That is incorrect. *Pittsburgh* involved the dereservation of one of two reserved channels. See *In the Matter of Deletion of Noncommercial Reservation of Channel \*16, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700 (1996).

<sup>13</sup> See *In the Matter of Deletion of Noncommercial Reservation of Channel \*16, Pittsburgh, Pennsylvania*, 11 FCC Rcd 11700 (1996).

<sup>14</sup> *Id.*

<sup>15</sup> See *Memorandum Opinion and Order* in Docket Nos. 8736 et al., 8 RR 469-70 (1952).